

violation of the inconsistent application rule, we believe that appropriate action is the dismissal of the latest filed application." 2 F.C.C.R. at 3494 (citations omitted).

Finally, the fact that Chesapeake's renewal application has now been granted is irrelevant to determining whether Four Jacks' application was acceptable when filed. As the Commission emphasized in Big Wyoming Broadcasting Corp., "Section 73.3518 is designed to 'prevent abuse of the Commission's processes by the filing of two or more applications which are inconsistent with each other.'" 2 F.C.C.R. at 3493 (quoting WSTV, Inc., 17 F.C.C. 530, 531 (1953)) (emphasis in Big Wyoming Broadcasting Corp.). Thus, a subsequent event--there a proffered amendment to one of the applications--cannot cure "the violation of a rule which occurred upon the act of filing the application." Id. Likewise, the fact that the Commission could and did process and grant Chesapeake's uncontested renewal application does not make Four Jacks' application for new facilities consistent with that renewal application, or undo the violation of the rule. As the Commission explained in Valley Broadcasting Co., Section 73.3518 applies whenever dismissal of one of the conflicting applications might be required by grant of the other. 58 Rad. Reg. 2d (P&F) 945, 948 (1985). The then pending Chesapeake renewal application absolutely precluded the grant of Four Jacks' application when it was filed, and, as discussed further infra, the happenstance that the Chesapeake renewal application did not draw a competing application, was uncontested, and was granted provides no basis

for departure from strictly applying the terms of Section 73.3518 which prohibited the filing of Four Jacks' application.

**III. Sound public policy and the express policies underlying Section 73.3518 support the dismissal of Four Jacks' application.**

The acceptance of the Four Jacks application would reverse existing sound public policy and precedent that protects against abuse of Commission processes for private gain. Under the licensing system set out in the Communications Act, licensees are granted their authorizations without any financial charge for the valuable spectrum they utilize. Accordingly, a licensee should not be permitted to reap a huge financial windfall from the sale of an authorization that it chooses to abandon in favor of gaining an improved mutually exclusive authorization. The Commission previously has recognized the impropriety of licensee efforts to pursue private gain through filing inconsistent applications, and it has acted to prevent this by dismissing the inconsistent applications. Southern Keswick, 34 F.C.C.2d at 625-627. It would be a major error to revoke this sound policy by accepting Four Jacks' application.

Separately, accepting Four Jacks' application would provide existing licensees with a major financial incentive to attack other incumbent licensees' authorizations solely in the hope of achieving immense private gains. The comparative hearing system is extraordinarily burdensome to public resources as well as to the private litigants involved. Offering any unnecessary encouragement to the improper utilization of this process plainly

is inconsistent with the Commission's obligation to conserve public resources for achieving public interest goals. Applicants who claim the right to invoke the comparative renewal hearing process should be required to do so based strictly upon the resulting benefit they perceive would accrue to the public interest, not upon the hope of attaining an immense private windfall.

The specific policies underlying Section 73.3518 likewise support dismissal. Section 73.3518 is designed "to avoid the waste of Commission resources, prejudice to other applicants, and delay of service to the public which arises when the Commission must process applications by the same person or entity, not all of which can be granted." Valley Broadcasting Co., 58 Rad. Reg. 2d at 948. Dismissal of Four Jacks' application is the only means to effectuate these purposes.

Prejudice to a competing applicant--Scripps Howard--through further delay in processing Station WMAR-TV's renewal application obviously would flow from accepting the improper Four Jacks application. The Commission has expressly held that the harm to competing applicants and the concomitant delays in processing valid applications outweigh any public interest benefit which might flow from avoiding strict application of Section 73.3518 in order to permit a choice of applicants for a particular facility. Big Wyoming Broadcasting Corp., 2 F.C.C.R. at 3494.

In addition to the unwarranted delay in the processing of Scripps Howard's renewal application, the improper structure of



a compelling rationale for not strictly applying established Commission policy and requiring that Chesapeake submit a timely modification application which is in accord with the rules.

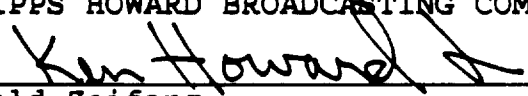
Under all these circumstances, and particularly in the absence of a timely filed request for waiver of Section 73.3518, no policy ground exists for departing from strict application of the terms of that rule, and severe public detriment would occur from encouraging licensees to further burden the Commission's scarce resources in hopes of achieving unwarranted private gains.

Conclusion

Commission precedent confirms that the filing of Four Jacks' application for new facilities violated Section 73.3518 of the rules. No request for a waiver of this rule accompanied Four Jacks' application, and Four Jacks' application cannot be deemed to be an application for modification of Chesapeake's Channel 45 license. Sound public policy and the specific purposes of Section 73.3518 would be ill served by processing Four Jacks' application. Accordingly, the Four Jacks application must be dismissed as defective in accord with Section 73.3566(a).

Respectfully submitted,

SCRIPPS HOWARD BROADCASTING COMPANY

By:   
Donald Zeifang  
Kenneth C. Howard, Jr.  
Elizabeth M. Yeonas

BAKER & HOSTETLER  
1050 Connecticut Avenue, N.W.  
Suite 1100  
Washington, DC 20036  
(202) 861-1500

May 1, 1992

**CERTIFICATE OF SERVICE**

I, Ruth E. Omonijo, a secretary at the offices of Baker & Hostetler, certify that copies of the foregoing "Petition to Dismiss" were hand delivered to the following:

Martin R. Leader, Esq.\*  
Fisher, Wayland, Cooper & Leader  
1255 23rd Street, N.W.  
Suite 800  
Washington, DC 20037

Barbara A. Kriesman, Chief  
Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
Room 702  
1919 M Street, N.W.  
Washington, DC 20554

Clay Pendarvis, Chief  
Television Branch  
Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
Room 700  
1919 M Street, N.W.  
Washington, DC 20554

  
Ruth E. Omonijo

\* By U.S. Mail

**OPPOSITION TO PETITION TO DISMISS**

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C.

In re Application of )  
 )  
FOUR JACKS BROADCASTING, INC. ) FCC File NO. BPCT-910903KE  
 )  
For a Construction Permit )  
for a New Television Station )  
on Channel 2 in )  
Baltimore, Maryland )  
  
To: The Chief, Mass Media Bureau

**OPPOSITION TO PETITION TO DISMISS**

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys, hereby submits its Opposition to the "Petition to Dismiss" filed on May 1, 1992 by Scripps Howard Broadcasting Company ("Scripps Howard") in the above-referenced proceeding. As demonstrated herein, the Scripps Howard petition is extremely untimely, misstates the governing facts, seriously misconstrues Commission case precedent and lacks any merit. Scripps Howard argues that the Four Jacks application contravenes the Commission's inconsistent application rule. However, under any test, the Four Jacks application is not an inconsistent application. Surely, Scripps Howard's counsel read the cases cited in its pleading and therefore must know that the petition to dismiss completely misstates the law in this area. Scripps Howard's apparent reason for filing the petition was to delay designation for hearing, so if any party is achieving a "private gain", as alleged in the Scripps Howard petition, it is Scripps

5-14-92



Howard. For these reasons, the Petition to Dismiss should promptly be dismissed.

**I. The Scripps Howard Pleading Is Extremely  
Untimely And There Is No Showing Of Good  
Cause For The Untimeliness**

1. Four Jacks filed its application for Channel 2 in Baltimore, Maryland on September 3, 1991, and the Commission released a Public Notice establishing January 22, 1992 as the date for the filing of any petitions to deny the Four Jacks application. Although Scripps Howard filed a petition to deny on January 22, 1992, it was not until May 1, 1992 -- three months after the petition to deny date and eight months after the filing date -- that Scripps Howard first advanced the argument contained in its Petition to Dismiss. The gist of Scripps Howard's argument is that the Four Jacks application should not have been accepted for filing, yet Scripps Howard provides no justification whatsoever for its failure to raise this argument in a timely fashion at an earlier date if it felt the argument was important.

2. Moreover, Scripps Howard's suggestion that its pleading is timely under Section 73.3587<sup>1/</sup> of the Commission's rules is without merit. Section 73.3587 sets forth procedures governing Informal Objections. The Scripps Howard pleading is not an Informal Objection. The Informal Objection rule is designed for the benefit of those parties who do not have standing to file a petition to deny. Here, Scripps Howard did file a petition to

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<sup>1/</sup> Section 73.3587 permits an Opposition but does not permit any Reply pleading. Therefore, upon the filing of this Opposition, the pleading cycle is complete.

deny and, certainly, the arguments advanced now should have been raised no later than the deadline for filing the petition to deny. Section 73.3587 is not designed to enable parties to delay proceedings by filing meritless pleadings many months late.

**II. Scripps Howard Has Erroneously Interpreted  
Section 73.3518 of the Commission's Rules**

3. Scripps Howard contends that the acceptance of the Four Jacks application was improper because it purportedly violated Section 73.3518 of the Commission's rules at the time it was filed. It is Scripps Howard's position that the Four Jacks application, filed September 3, 1991, was inconsistent with the license renewal application for Station WBFF(TV), Channel 45, Baltimore, Maryland which was filed on May 31, 1991 and granted on September 26, 1991. Thus, for a very brief period of time (23 days) the WBFF license renewal application was pending after the Four Jacks application was filed.

4. Section 73.3518 states:

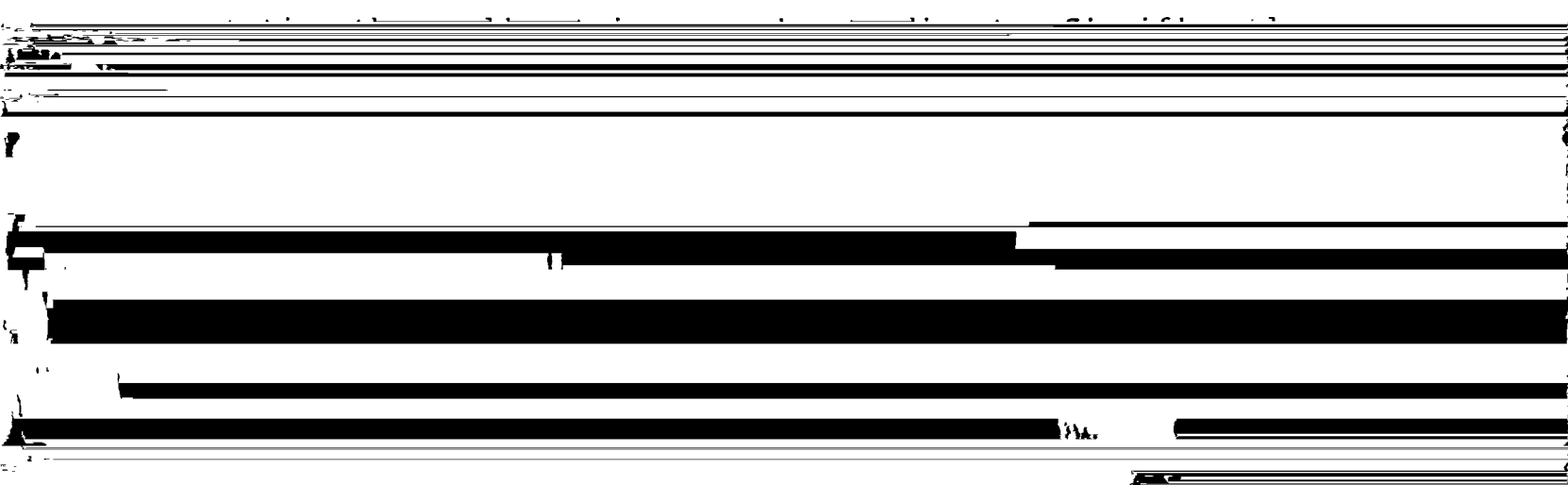
While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee.

At the outset, it should be noted that Four Jacks is not the same entity as the license renewal applicant for Station WBFF(TV). WBFF(TV) is licensed to Chesapeake Television Licensee, Inc. It is also noteworthy that there are not two applications presently pending -- only the Four Jacks application is pending.

5. Even if Four Jacks were the "same applicant," as construed by Section 73.3518, it is clear that that rule does not bar the licensee of a station from applying for another frequency in the community so long as the applicant proposes to divest the station it already owns. Attached hereto as Attachment A is a Memorandum dated January 13, 1984 prepared by a supervisory attorney in the FM Branch which states the following principle with respect to the Commission's contingent application policy:

. . . a commitment by an applicant to dispose of other station(s) -- not other pending CP applications -- does not constitute a violation of the rule, and can be dealt with by an appropriate divestiture condition in the HDO.

6. Scripps Howard simply does not understand the policies set forth in the very cases it cites. The principle established in the January 13, 1984 Commission memorandum has been upheld in a long line of cases. It is very clear that an applicant may apply for a new facility and propose to divest its interest in an existing facility. Since renewal applications can come due at any time, it would make no sense to refuse to accept a divestiture proposal simply because a license renewal application was pending. The license renewal application covers the very



Corp., 2 FCC Rcd 3493 (1987). In Valley, the Commission stated that while the multiple ownership rules expressly prohibited an individual from owning interests in a new FM station and a new VHF television station, there was no violation of Section 73.3518 because the applicant had committed to divest his interest in the television applicant upon grant of the FM application. In Comark as well, the Commission held that a divestiture proposal eliminated a multiple ownership problem. Both the Valley and Comark cases observed that any construction permit issued would be appropriately conditioned.

8. There was no divestiture commitment in Big Wyoming, which, in any event, involved a factual scenario dissimilar to that presented here. In Big Wyoming, Mr. and Mrs. Robert Campbell owned 90% of the stock of Big Wyoming, an applicant for a new FM station in Rock Springs, Wyoming, which was mutually exclusive with the license renewal application of KSIT(FM), Rock Springs, Wyoming. The Campbells also owned 100% of Radio West, Inc., an applicant for a new FM station in Riverton, Wyoming. The predicted 1.0 mV/m contours of the two proposals violated the multiple ownership rules when the applications were filed and the Commission refused to accept a subsequent curative engineering amendment designed to eliminate the duopoly overlap. Here, however, the Four Jacks application contained a commitment by Four Jacks' principals to divest their interests in an existing station, not another application. Big Wyoming did not involve an applicant who proposed to divest its existing station which happened to have a license renewal application pending. The Four

Jacks application can thus be processed pursuant to Valley and Comark and the issues presented in Big Wyoming simply do not come into play.

9. Indeed, there are numerous cases in which applicants have proposed to divest existing facilities in order to comply with the multiple ownership rules and/or Section 73.3518. Moreover, the Commission routinely grants such applications with appropriate divestiture commitments.

10. The Scripps Howard petition also completely misinterprets other Commission precedent. The Scripps Howard petition places reliance on Atlantic Broadcasting Co., 8 RR2d 967 (1966) and Wabash Valley Broadcasting Corp., 18 RR 559 (1959). Significantly, these cases did not involve divestiture commitments. Moreover, Scripps Howard has ignored certain critical facts and language in these cases. Atlantic and Wabash Valley both make it clear that the Four Jacks application does not violate the inconsistent application rule. In Atlantic, the Commission considered an application by Atlantic Broadcasting Co. for a construction permit to change the frequency, station location and hours of operation and to increase the daytime power of Station WUST, Bethesda, Maryland. The frequency, power, station location and hours of operation sought by WUST were those specified in the license of Station WOL, Washington, D.C. and thus the WUST application, if acceptable, would be mutually exclusive with WOL's license renewal application. In addition, WUST had pending in hearing an application for an increase in

power on its existing frequency. The Commission's decision stated as follows:

Although the Commission has held that prosecuting an application for renewal of license on one channel is not inconsistent with prosecuting an application for a construction permit to shift to another channel, Wabash Valley Broadcasting Corp. (WTHI-TV), 18 RR 562, 568, there is no question but that Atlantic's prosecution of its application to shift to WOL's frequency and make other changes is inconsistent with the prosecution of its application in hearing to increase power on its present frequency.

11. Atlantic thus involved two applications to upgrade one facility in mutually inconsistent ways. In contrast, this case does not involve two applications to upgrade Channel 45. Instead, it involves an application for a new facility on Channel 2 by Four Jacks, and Four Jacks' principals have proposed to divest their interests in Channel 45. It is immaterial that the license renewal application for Channel 45 was pending for a very short period of time after the Four Jacks application was filed. Scripps Howard's entire argument is premised on that portion of the Atlantic case in which the Commission addressed the issue of two applications to upgrade one facility and said that an applicant may not simultaneously apply to increase power on its present frequency and also apply for a change in the station's frequency. But those are different facts than the facts presented here, and Scripps Howard has ignored the Commission's clear holding in Atlantic that an application for renewal of license on one channel is not inconsistent with prosecuting an application to shift to another channel.

12. Scripps Howard similarly misconstrues Wabash Valley Broadcasting Co., supra. In that case the Commission held that an application by an existing station for renewal of its license for operation on Channel 10 was not inconsistent or conflicting with an application by the same licensee for operation on Channel 2 in the same community. The Commission stated that the inconsistent application rule "is applicable only to two or more applications for new or additional facilities . . ." 18 RR2d 562, 568.<sup>2/</sup>

III. Scripps Howard's Suggestion That The  
Four Jacks Application Contravenes  
Sound Public Policy Is Without Merit

13. Scripps Howard's petition notes that "[t]he Commission does not preclude existing licensees from pursuing efforts to upgrade their facilities by operating on a superior channel" (Petition, p. 5) and suggests that Station WBFF(TV) should seek a better channel by way of an amendment. This argument makes no sense at all. As noted earlier, Station WBFF(TV) is licensed to Chesapeake Television Licensee, Inc. which is not the same entity

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<sup>2/</sup> WSTV, Inc., 43 FCC 1254 (1953), cited by Scripps Howard, is inapposite since the case involved two applications filed by Storer Broadcasting Company for new television stations. Chapman Radio and Television Co., 27 FCC2d 23, 20 RR2d 1144 (Rev. Bd. 1971) is also inapposite. In Chapman the licensee of a television station in Birmingham, Alabama was seeking to modify its existing facilities while simultaneously seeking a construction permit for a television station to serve Birmingham on a different channel. Southern Keswick, Inc., 24 RR2d 173 (1972) is not remotely similar. There the Commission held that the Keswick application for a change of

as Four Jacks. Furthermore, Station WBFF(TV) operates on UHF Channel 45. Four Jacks is seeking a television facility on VHF Channel 2.

14. Scripps Howard also seems to think that the Four Jacks



recognized as a ploy on the part of Scripps Howard to delay designation for hearing and should be promptly dismissed.

Respectfully submitted

**FOUR JACKS BROADCASTING, INC.**

By: Kathryn R. Schmeltzer  
Martin R. Leader  
Kathryn R. Schmeltzer  
John K. Hane

Its Attorneys

Fisher, Wayland, Cooper  
and Leader  
1255 23rd Street, N.W.  
Suite 800  
Washington, D.C. 20037  
(202) 659-3494

Dated: May 14, 1992

ATTACHMENT A

## memorandum

DATE: January 13, 1984

REPLY TO  
ATTN OF: Gordon Malick, Supervisory Attorney

SUBJECT: Contingent Applications - Ownership Rule Violations

TO: All FM Branch Attorneys, Specialists and Analysts

Attached hereto is a copy of the Division Chief's August 5, '981 letter dismissing as inadvertently accepted for filing a mutually exclusive commercial FM application for construction permit for a new station at Grundy Center, Iowa, that would have violated Section 73.240(a)(2) - the regional concentration rule - because the 1 mv/m overlapped either an existing FM station or a pending FM CP application located within 100 miles and having common ownership.

This letter states the Commission's contingent application policy that we do not accept for filing and/or process any application predicated on the expectation of the denial of another application. This policy is equally applicable to violations of other aspects of the ownership rules.

Therefore, where applicants have interests in other earlier filed pending applications, we need to be alert to potential violations of the contingent application rule and return or dismiss the errant application when appropriate. In this regard, a commitment by an applicant to dispose of other station(s) - not other pending CP applications - does not constitute a violation of the rule, and can be dealt with by an appropriate divestiture condition in the HDO.

Based upon the foregoing, please disregard the appendix to M.F. Welch et al., MM 5977, released August 23, 1983 (kermit, Texas).

CERTIFICATE OF SERVICE

I, Sybil Briggs, hereby certify that I have this 14th day of May, 1992, mailed by first class United States mail, postage prepaid, copies of the foregoing "OPPOSITION TO PETITION TO DISMISS" to the following:

\*Roy J. Stewart, Esq.  
Chief, Mass Media Bureau  
Federal Communications Commission  
1919 M St., N.W.  
Room 314  
Washington, D.C. 20554

\*Barbara A. Kreisman, Esq.  
Chief, Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M St., N.W.  
Room 702  
Washington, D.C. 20554

\*Clay Pendarvis, Esq.  
Chief, Television Branch  
Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M St., N.W.  
Room 700  
Washington, D.C. 20554

Donald Zeifang, Esq.  
Kenneth C. Howard, Jr., Esq.  
Baker & Hostetler  
1050 Connecticut Ave., N.W.  
Suite 1100  
Washington, D.C. 20036  
Counsel to Scripps Howard  
Broadcasting Company

  
Sybil Briggs

\*Hand Delivered

**REPLY TO OPPOSITION TO PETITION TO DISMISS**

Stamp & Return  
**COPY**

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

RECEIVED

MAY 26 1992

Federal Communications Commission  
Office of the Secretary

In re )  
Application of Four Jacks )  
Broadcasting, Inc. )  
 )  
For a Construction Permit )  
For a New Television )  
Facility on Channel 2 in )  
Baltimore, Maryland )

FCC File No. BPCT-910903KE

TO: The Chief, Mass Media Bureau

REPLY TO OPPOSITION  
TO PETITION TO DISMISS

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document actually supports Scripps Howard's position.

VII.	Four Jacks' analyses of the cases cited in Scripps Howard's Petition both ignore Scripps Howard's explanation of the cases' relevance and are contradicted by express language in the cases themselves.	8
VIII.	Four Jacks' policy arguments are contradicted by the Commission's rules and case precedent.	14
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### Summary

The arguments in the "Opposition to Petition to Dismiss" ("Opposition") filed by Four Jacks Broadcasting, Inc. ("Four Jacks") fail to address the substance of Scripps Howard Broadcasting Company's ("Scripps Howard") "Petition to Dismiss" ("Petition") and misstate the relevant Commission rules and precedent.

While claiming that its application is not an inconsistent application "under any test," Four Jacks in fact fails to address how its application meets the simplest and most crucial test--the one set out by the plain language of Section 73.3518.

Contrary to Four Jack's suggestion, Section 73.3518 applies here because Four Jacks and Chesapeake, the renewal applicant for Channel 45, are controlled by the same persons. Both Commission precedent and the language of Section 73.3518 demonstrate that the rule applies to bar inconsistent applications filed by commonly controlled entities.

The short period of time during which Chesapeake's inconsistent renewal application remained pending is irrelevant because it was the filing of Four Jacks' inconsistent application that violated Section 73.3518. Any consideration of the length of time an inconsistent application remained pending after the violation necessarily would lead to arbitrary conclusions.

The internal staff memorandum offered by Four Jacks actually supports Scripps Howard's position. Even if the memorandum is assumed to state a contrary position, it bears no weight against



the Commission decisions relied upon by Scripps Howard.

Four Jacks' Opposition ignores the relevant holdings of the cases cited by Scripps Howard. In particular, Four Jacks misstates key parts of the Atlantic and Wabash Valley decisions which hold that while an application to shift the frequency of an existing station to a new channel is consistent with seeking renewal for an existing mutually exclusive station, an application proposing new facilities in the same service and in the same community is inconsistent with pursuing renewal for the mutually exclusive facilities. Four Jacks similarly misinterprets the holdings of those Commission decisions which preclude any reliance on promises of subsequent divestment to mitigate a violation of Section 73.3518.

Finally, Four Jacks's Opposition attempts to sidestep the adverse policy implications that would flow from permitting Four Jacks' principals to sell the authorization for Channel 45 if they should succeed in using expensive public processes to wrench Channel 2 from Scripps Howard. In one of the cases cited by Scripps Howard's Petition, for example, the Commission itself recognized that where an applicant--whatever its stated goal--in reality seeks to relocate to a different channel in the same community, any implementation of such a proposal must include the return to the public domain of the channel allotment that would be vacated by the frequency change.